West Penn Power Company and the Potomac Edison Company d/b/a Allegheny Power and Allegheny Energy Supply Company, LLC, A Single Employer, and their agent Allegheny Energy Service Corporation *and* Utility Workers Union of America System Local 102, AFL–CIO. Cases 6–CA–31003, 6–CA–31204, 6–CA–31400–2, and 6–CA–31623

January 31, 2006

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On July 11, 2003, the National Labor Relations Board issued its Decision and Order in this proceeding,[1] in which it found, inter alia, that the Respondent had violated Section 8(a)(5) and (1) of the Act by refusing to provide the Union with requested "non-financial" information pertaining to subcontracting, such as contractors' names, project locations, dates of work, and number of workers, as well as "financial information" on the costs of the subcontracting. Subsequently, the Respondent petitioned the Fourth Circuit for review of the Board's Order, and the General Counsel cross-petitioned for enforcement of the Order. On January 12, 2005, the Fourth Circuit granted enforcement in part, denied enforcement in part, and remanded the case to the Board.[2] The Fourth Circuit enforced the Board's Order to the extent that it required the Respondent to provide the requested "non-financial" information, but refused to enforce the part of the Board's Order requiring the Respondent to furnish the requested "financial" information. The court found the financial information relevant, but it concluded that the Board had erred in not expressly determining that the Union had demonstrated a "specific need" for the cost data.[3] The court remanded the case to the Board for a determination of whether the Union had shown such a need.

On July 27, 2005, the Board notified the parties to this proceeding that it had decided to accept the remand from the Fourth Circuit, and invited the parties to file statements of position with respect to the issues raised by the remand. The General Counsel, the Union, and the Respondent each filed a statement of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We accept the court's remand as the law of the case. Applying the standard set forth by the court, we find, for the reasons set forth below, that the Union demonstrated that the subcontracting cost data it requested was needed to enable it to determine, both for contract administration and negotiation purposes, the volume of subcontracting engaged in by the Respondent. Accordingly, we conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the requested cost data.

Facts

The Respondent is a public utility company that generates and distributes electricity. The Union represents a unit of about 1200 employees working at 29 locations in four States. The parties' collective-bargaining agreement permits the Respondent to use "outside contractors" to perform some bargaining unit work.[4] The contract contains a "Contract Work" provision, set forth in section 27.1 of the agreement, which permits subcontracting if the Respondent maintains a work force of "sufficient size to take care of the expected regular work of the Company." Section 39, the "Resource Sharing" provision, allows the Respondent to temporarily reassign unit employees to perform nonemergency work at any company location in the four-state service area, provided that the Respondent gives first preference to employees whose permanent job locations were closest to the work, and uses contractors only as a last resort. Section 40 states that the "intent of Resource Sharing is to reduce costs and reduce the need for contracting out work." The agreement also contains a reopener provision, which provides that, upon notice, the parties would meet to negotiate any issue that may arise.

A 1977 side agreement obligated the Respondent to supply the Union with quarterly contractor reports identifying all outside contractors performing ordinary maintenance and repair work, with a description of the work and its location. Before 1998, the Respondent provided the specified information, as well as the start and finish dates of the work and the number of man hours used to perform the work.

The information dispute before us had its origins in the Respondent's 1998 decision to switch to a new contractor report format. Although the new report form had spaces for listing the name of the contractor, the type of work, its location, and the number of workers, the Respondent listed only a broad description of the type of work and wrote "as needed" in the column calling for the number of workers. In addition, the new form had no space for reporting a project's start and end dates.

As the court found, the Union regarded the new reports as "deplorably inadequate."[5] The Union made several unsuccessful oral requests for the missing data. Subse-

[1] 339 NLRB 585.

[2] *West Penn Power Co. v. NLRB*, 394 F.3d 233 (4th Cir. 2005).

[3] 394 F.3d at 245.

[4] The contract, negotiated in 1996, was effective from May 1, 1996, to May 1, 1999. In October 1997, the parties extended the agreement through April 30, 2001.

[5] 394 F.3d at 238.

quently, between September 1999 and January 2001, the Union made seven written requests to the Respondent, stating that the information on subcontracting was incomplete, inadequate, untimely, or missing altogether.

In a letter dated September 22, 1999 (GC Exh. 28), the Union complained that the contractor reports continued to be incomplete, stating that it needed specific information in order for the Union to "protect the interests" of its members. By letter dated November 1, 1999 (GC Exh. 29), the Union again requested a complete set of contractor reports for the first three quarters of 1999.[6] Finally, on January 17, 2000, the Respondent provided contractor reports for the third quarter of 1999, showing contract work at a few locations. (GC Exh. 30.)

However, on March 7, 2000, the Union noted that there were no third quarter reports for some 17 locations. The Union asked the Respondent to clarify whether the failure to supply a contactor report for a particular location meant that there was no contract work being performed there. (GC Exh. 31.)

The court found that on March 24 and May 1, 2000, the Respondent "continued to provide the Union with contractor information in the same incomplete fashion."[7] (GC Exhs. 32 and 33.) The Respondent did not answer the Union's question whether the absence of reports for specific locations meant that there was no contracting.

By letter of May 24, 2000, the Union linked the contractor information deficiencies to the Union's ability to determine whether the Respondent was complying with the resource sharing provision of the contract and whether it was abiding by the staffing levels required by the collective-bargaining agreement. (GC Exh. 68.) Thus, the Union wrote that it had filed grievances over "multiple situations where the Company has utilized Resource Sharing ("RS") rights without abiding by the staffing levels that were promised in return." The Union also noted that the "Company promised to reduce outside contracting at RS locations" and that "[i]mportant information about subcontracting has continually been withheld from [the Union]." The Union further stated that the "information violations obviously make it harder for us to investigate the problems or to respond to constant questions from members. Failures to reduce subcontracting are additional elements of the Resource Sharing violation." (GC Exh. 68.)

By letter dated July 6, 2000, the Union stated that it continued to "reserve the Union's contract and information rights" and noted that "[s]upplying the Union with information allows the contractual process to get started. The Union then has the right to investigate whether jobs or work tasks are being diverted." The Union requested "data on actual outside contractor usage," stating that "past failures to compile this information on a monthly basis may make it much more difficult for all parties to reconstruct the data after-the-fact, and they will make it harder for the Union to focus additional requests on the trends in contractor hours or contractor expenditures. Gaps in responses also leave questions about the potential importance of the missing data." (GC Exh. 34.)

By letter dated July 24, 2000, the Respondent replied, denying any contract violations with respect to Resource Sharing and stating that "no reduction in jobs or positions has occurred as a result of Resource Sharing." The Respondent further stated that it had provided "readily available contractor information on a quarterly basis." (GC Exh. 35.) On August 7, 2000, the Respondent provided certain contractor reports for the second quarter of 2000, but reports on more than 20 locations were not included. (GC Exh. 36.)

We now turn to the specific information request that is the subject of the court's remand. In a letter dated August 18, 2000 (GC Exh. 19), the Union complained again about the "huge gaps" in contractor information for many "locations and months." The Union stated that the "as needed" language routinely inserted in the number of workers column of the contractor reports was so general as to be meaningless. For the first time, the Union sought data processing information on contractor costs incurred by the Respondent, explaining its request as follows:

> Because the subcontracting data has been so incomplete in the forms we requested, and because the complete information will be harder to piece together as time goes on, we now request as well data processing information for the time periods beginning 1/1/94 (and continuing) to show the trends before and after contract commitments were made. The information would show the amounts of contracting, both by dollar expenditures and by numbers of work units, including but not limited to accounts payable data. We request that the figures be broken out by accounting period (including months and years, if available), by operational area, by location, by vendor, and by type of work, to the extent available. [Emphasis omitted.]

The letter further mentioned the Union's concern about "more and more diversions of work to contractors" and the Union's need for the information in order for an arbitrator to "resolve the disputes" concerning the meaning of the contract work and resource sharing provisions.

The Respondent continued to send the Union some quarterly contractor reports, but, as the court stated, the "problems with gaps, abridged information, and tardiness

[6] Meanwhile, the number of unit employees was decreasing: in Pennsylvania alone, the unit had decreased from 1022 to 896. 394 F.3d at 243. Given the Company's continuing use of contractors to perform unit work, the Union had concerns that the shrinkage was contradicting the Company's contractual guarantee to maintain a unit "of sufficient size to take care of the expected regular work of the Company."

[7] 394 F.3d at 239.

remained."[8] In a January 24, 2001 letter (GC Exh. 38), Union President Sterner reiterated the request for "data-processing [information] showing the trends and amounts paid to outside contractors and the work units performed by them." The Union explained the importance of the data processing information, stating that it "would help the Union investigate, first, whether any particular subcontracting episodes were unfair—in light of resource sharing, or past grievance settlements . . .—and, second, whether full patterns of contracting have created across-the-board unfairness. These are issues the Union can investigate either for potential grievances or for upcoming negotiations. Both are important to us." The Union noted that "the size of the bargaining unit has fallen significantly" since the contract was signed and that "[c]omplete information remains relevant to our looking at how the size of the Company's regular workforce compares to the amount of the Company's regular work, as well as how subcontracting has varied after the Contract made promises about Resource Sharing." The Union went on to discuss why the data processing information was necessary. It stated that the information provided by the Respondent was incomplete, noting that "[g]aps remain for most locations for most calendar quarters" and that the "combination of documents and e-mails . . . do not make clear which contractors are doing what jobs on what particular dates. The e-mail pages contradict and confuse the other pages." The Union then stated that "[i]t is impossible to fit together the different pieces of these responses" and cited a number of examples of discrepancies in the information provided by the Respondent.

Analysis of the Issue Remanded by the Court

A. The Union Demonstrated That It Needed the Contractor Cost Data for Contract Administration Purposes

As discussed above, two contract provisions lie at the heart of the instant dispute: the contract work provision and the resource sharing provision. The contract work provision permitted subcontracting if the Respondent maintained a work force "of sufficient size to take care of the expected regular work of the Company." This provision protected bargaining unit members from the diversion of bargaining unit work to subcontractors. The resource sharing provision granted the Respondent the right to move unit employees temporarily to where they were needed most, but the Respondent was required to follow an order of preference specified in the contract and contractors were to be used only as a last resort. The resource sharing provision specifically committed the Respondent to "reduce the use of contractors." In order to police the Respondent's compliance with these provisions, the Union needed to know how much subcontracting was actually occurring.

[8] 394 F.3d at 240.

Initially, the Union attempted to ascertain the extent of subcontracting by requesting that the Respondent provide the nonfinancial information missing from the quarterly reports, such as contractors' names, project locations, description and dates of work, and number of workers involved. However, as detailed above, the Respondent repeatedly failed to provide the Union with nonfinancial subcontracting information sufficient to meet the Union's legitimate needs. Consequently, the court agreed with the Board that the Respondent violated Section 8(a)(5) by refusing to provide the Union with the requested nonfinancial information pertaining to subcontracting. The court summarized the Respondent's failure to satisfy the Union's information requests as follows:

- First, the contractor report forms did not adequately describe the type of work performed or indicate the start and end dates for contract jobs. Although the form had a column for providing the number of workers used on a particular job, the Company usually inserted "as needed" rather than a number. And the Company did not respond to the Union's objection that this practice was not informative. . . .
- Second, some of the contractor information was provided as much as two years late.
- Third, for a majority of locations (over twenty) no information was provided at all for many calendar quarters, and the Union was never told whether the failure to provide information for a particular location meant that no contractors were being used.

394 F.3d at 240. As a result, the Union was unable to determine the extent of subcontracting and accordingly could not adequately police the contract.

We find that the Union articulated specific reasons for needing the financial information at the time the information was requested in its letter dated August 18, 2000, and it reiterated and amplified those reasons in its January 24, 2001 letter. For example, in its August 18, 2000 letter, the Union stated that it needed the data processing information "[b]ecause the subcontracting data has been so incomplete in the forms we requested, and because the complete information will be harder to piece together as time goes on." Hence, the Union emphasized that it was requesting the information "to show the trends before and after contract commitments were made." The Union reiterated its need for the data processing information in its January 24, 2001 letter, stating that it "would help the Union investigate, first, whether any particular subcontracting episodes were unfair . . . and, second, whether full patterns of contracting have created across-the-board unfairness." The Union observed that "[g]aps remain for most locations for most calendar quarters," that the "combination of documents and e-mails . . . do not make

clear which contractors are doing what jobs on what particular dates," and that "[i]t is impossible to fit together the different pieces of these responses." We find that in those letters the Union demonstrated a "specific need" for the cost data.

We find the Respondent's unlawful conduct of providing untimely, incomplete, and inadequate information put the Union in the position of needing the subcontracting cost data in order to assess the volume of contracting that was occurring. Because of the Respondent's ongoing refusal to provide timely, complete, and accurate nonfinancial information, the Union had to resort to financial information in order to determine whether the Respondent was meeting its contractual commitments. As the Union succinctly explains in its brief, having "hit a virtual brick wall" in its efforts to obtain non-financial information showing the volume of subcontracting, the Union needed the subcontracting cost data as a "useful proxy."

The Respondent asserts that the Union has not established a need for the cost information because the Respondent is not claiming that its decision to subcontract was related to costs. *Southwestern Bell Telephone Co.*, 173 NLRB 172 (1968), relied on by the Respondent, is distinguishable. In that case the union requested information concerning the cost of subcontracting and what the cost would have been had the work been performed by the respondent's own employees. The employer maintained that the information was irrelevant, stating that the work had been subcontracted because the employer's own employees were too busy to perform it and not on the basis of cost. Under such circumstances the Board agreed that the financial information was not relevant, finding that the union had failed to explain how cost was relevant where none of the contract provisions relied on by the union in support of its grievances referred to cost, and cost was not asserted as a reason for subcontracting. Similarly, in *Southwestern Bell Telephone Co.*, 262 NLRB 928, 933 (1982), the Board adopted the judge's finding that the "probable relevance" of the requested financial information about subcontracting was not demonstrated because the respondent never asserted an economic defense for its actions and it was "clear" that the subcontracting occurred for noneconomic reasons.

In contrast, in the instant case, the court has already found that the cost information is relevant because it "could show the extent of the Company's use of outside contractors." 394 F.3d at 244. Thus, relevance of the requested financial information is not at issue here. Rather, the issue here is whether the Union has demonstrated a specific need for the information. In light of the Union's repeated assertions of its inability to derive the "extent of the Company's use of outside contractors" from the untimely, incomplete, and inadequate nonfinancial information provided by the Respondent, the Union has demonstrated a specific need for the financial information. See *Quarto Mining Co.*, 282 NLRB 696, 700 (1987), in which the Board adopted the judge's decision requiring production of subcontracting cost data in order to give "guidance to the Union as to the magnitude of the work done by the subcontractors."

B. The Union Demonstrated That It Needed the Contractor Cost Data for Contract Negotiation Purposes

By its terms, the parties' collective-bargaining agreement was scheduled to expire on April 30, 2001. In order to determine whether to attempt to renegotiate issues relating to subcontracting, the Union needed to ascertain the extent and pattern of subcontracting that was occurring. As set forth above, because the nonfinancial information provided by the Respondent concerning the amount of subcontracting was untimely, incomplete, and inadequate, the Union needed the cost data to get a clear picture of the volume of subcontracting. Unlike in *General Electric v. NLRB*, 916 F.2d 1163 (7th Cir. 1990), relied on by the Respondent, the Union's request for financial information for purposes of preparation for negotiations was not premature. At the time of the Union's August 2000 request for financial information, the contract expiration was 8 months away and at the time of the January 2001 renewal of its request, the contract was due to expire in less than 4 months. By contrast, in *General Electric*, the contract was not due to expire for 16 months and the earliest date negotiations could commence was 13 months after the union's request. Furthermore, the contract in the instant case contained a reopener that the Union might have been able to invoke to renegotiate the provisions dealing with subcontracting if the information it requested showed a necessity to do so. In *General Electric* there was no evidence of a reopener. We find, therefore, that the Union has shown that it needed the requested information for negotiation purposes.

C. Conclusion

In sum, applying the standard set forth by the court, we find, for the reasons set forth above, that the Union demonstrated that the subcontracting cost data it requested was needed to enable it to determine, both for contract administration and negotiation purposes, the volume of subcontracting engaged in by the Respondent. Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the requested subcontracting cost data.[9]

REMEDY

Having found that the Respondent violated Section 8(a)(5) and (1) by refusing to provide the Union with the subcontracting cost information it first requested by letter

[9] In so finding, we are not holding that a union will always be entitled to receive requested subcontracting cost data from an employer. Rather, we are finding only that the Union is entitled to this information under the specific facts of this case.

dated August 18, 2000, we shall order the Respondent to furnish the Union with the requested information.[10]

The Respondent argues that the Union is not entitled to any cost information because the nonfinancial information that the Board, with court approval, has already ordered the Respondent to produce "is more than sufficient to show the trends in contractor usage over the broad period of time for which it was requested." We disagree.

"The right of the Union to the information requested must be determined by the situation which existed at the time the request was made, not at the time the Board or the courts get around to vindicating that right." *Mary Thompson Hospital*, 296 NLRB 1245, 1250 (1989), enfd. 943 F.2d 741 (7th Cir. 1991). See also, *Borgess Medical Center*, 342 NLRB No. 109, slip op. at 3 (2004) (acknowledging that "the issue of whether there is a violation is to be determined by the facts as they existed at the time of the union's request"). Although the remedy for an information violation "must take into account the facts as they exist at the time of the Board's order", the Respondent has the burden of showing that the "stated need for the information is no longer present." *Borgess*, 342 NLRB No. 109, slip op. at 3.

Here, the Respondent has not met its burden of showing that the information is no longer needed. As the court recognized, in its August 18, 2000 letter, the Union expressed its "legitimate concern" that "[b]ecause of the passage of time," the complete "information would be hard to piece together in the field. This led the Union to conclude that central data processing information showing longer-term trends in contracting might be the only means to evaluate the Company's 1996 commitment to reduce its reliance on outside contractors." 394 F.3d at 248. The Respondent has not shown that providing the nonfinancial information at this late date, many years after it was requested, will enable the Union to "piece [the subcontracting picture] together" and evaluate the Respondent's compliance with its contractual obligations. So far as the record shows, the Union still needs to know how much the subcontracting cost the Respondent in order to reconstruct the amount of subcontracting that had taken place over the relevant period. Accordingly, we shall order the Respondent to provide the Union with the requested subcontracting cost data.[11]

ORDER

The National Labor Relations Board orders that the Respondent, West Penn Power Company and the Potomac Edison Company d/b/a Allegheny Power and Allegheny Energy Supply Company, LLC, a single employer, and their agent Allegheny Energy Service Corporation, Greensburg, Pennsylvania, its officers, agents, successors, and assigns, shall

Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with the subcontracting cost data information it requested on August 18, 2000 (reiterated on January 24, 2001).

(b) Within 14 days after service by the Region, post at its facilities in Pennsylvania, West Virginia, Maryland, and Virginia copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 18, 2000.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[10] Inasmuch as the court has already enforced the cease-and-desist provisions of our previous Order, we shall not repeat them here.

[11] Cf. *SBC Midwest*, 346 NLRB No. 8, slip op. at 4–5 (2005), in which the Board found that the employer violated Sec. 8(a)(5) by failing to provide the union with information concerning the amount of unit work being subcontracted, but was not obligated to provide pricing information. The Board recognized that if the union had the pricing information, it might be able to calculate how much work was being subcontracted. However, because the Board's remedial order would have required the employer to provide the union with specific information concerning the amount of work being subcontracted, the Board concluded that "the Union will not need to calculate for itself the amount of such work." In *SBC*, the Board found in essence that the union would be able to ascertain the amount of subcontracting from the nonfinancial information the employer was being ordered to provide. Here, the Respondent has not shown that the Union will be able to reconstruct the volume of subcontracting over an extended period of time from the nonfinancial information that it originally requested. As set forth above, that nonfinancial information is no longer adequate to enable the Union to quantify the amount of subcontracting that occurred long before.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. January 31, 2006

Robert J. Battista	Chairman
Peter C. Schaumber	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL provide the Union with the subcontracting cost data information it requested on August 18, 2000 (reiterated on January 24, 2001).

WEST PENN POWER COMPANY AND THE POTOMAC EDISON COMPANY D/B/A ALLEGHENY POWER AND ALLEGHENY ENERGY SUPPLY COMPANY, LLC, A SINGLE EMPLOYER AND THEIR AGENT ALLEGHENY ENERGY SERVICE CORPORATION